Das neue EG-Vertragskollisionsrecht. Die Artt. 4,5 und 6 des Übereinkommens über das auf vertragliche Schuldverhältnisse anzuwendende Recht vom 19.6.1980. Eine rechtsvergleichende Analyse objektiver Vertragsanknüpfungen.

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Summary

In this thesis an inquiry is made into the law governing an international contract in the absence of a choice of law by the contracting parties. Within the framework of this inquiry the Rome Convention on the Law Applicable to Contractual Obligations from 19.6.1980 (ECC) is given a central place. The provisions laid down in articles 4, 5 and 6 contain conflict of law rules for respectively international commercial contracts, consumer contracts and employment contracts.

With regard to the Convention Conflict of Laws students reflect an ambiguous standpoint. On the one hand, the opinion is upheld that the ECC in fact already embodies the existing conflict of laws rules of those states joining the Convention; on the other hand, critical voices are raised against the ECC.

Part one of the book gives in *chapter 1* a survey on existing Conflict of Laws relating to contractual matters in the Netherlands, the Federal Republic of Germany, France, the United Kingdom, all of them joining the ECC, as well as the Conflict of Laws in the United States of America). An examination as to the question in how far some basic principles of respectively Anglo`Saxon and continental Civil Conflicts of Law still might claim applicability after the Convention has entered into force is undertaken.

In *chapter 2* the opinion is stated that the widely drafted provisions of the ECC indeed offer the judge a considerable freedom of decision, which freedom however, could at the same time seriously threaten the purpose of certainty, aimed at by the Convention. Thus, in case of "psychological" judicial justifications, based on a ficticious intention as if the parties would undoubtedly have decided "in accordance with the decision given", various problems arise: One might think of the lack of a manageable distinction between situations containing a real choice of law by the parties and situations in which there is no such choice. Furthermore underlying judicial motives about the ascertainment of the objective proper law, the required measure of internationality of the contract, as well as the taking into consideration of foreign mandatory rules etc. will often remain obscure. Mutatis mutandis the

same conclusions may be drawn as far as the mainly from English and American Conflict of Laws stemming principle of validation, i.e. the submitting of an international contract under a proper law not leading to nullity of contract, is concerned: Except to the intention of the parties, the principle mentioned is attributed to the objective goal of the furtherance of commerce. As follows from this chapter, unless the Convention itself directly prescribes such a favour of international commerce (cf. art. 11) no room is left for such a principle.

Chapter 3 suggests, the mainly continental choice of law principle of "Typenbildung" - i.e. the stressing of mutual differences of the various contract types while ascertaining the proper law of the contract - doesn't contain the perfect realisation of the closest relationship principle. Only scarcely the average contract will because of its "typical" features belong "immanently" to one specific, exclusively adequate national system of law. However, the equally upon the mutual differences of contract types based doctrine of characteristic performance seems to include pretentions of this kind. Manipulations both of the idea "characteristic", and of the topographic completion of the doctrine ("Schuldort") sufficiently demonstrate that this pretention is untenable. Moreover, the intrinsic weakness of the doctrine is masked by mere paraphrastic repetitions of the "Gesetz des charakteristischen Inhalts" for alternative ways in ascertaining the proper law.

In *chapter 4* it's noticed that up till now none of the existing proper law rules functions perfectly. This conclusion applies to classical, so called rigid rules (place of contracting, place of performance, nationality, domicile and so on) as well as to "more up to date" choice of law doctrines all alike. Consequently, perceptions having been altered in the course of times will influence the discussion when it comes to filling in the subsidiary proper law formulas of art. 4.5 and 6.2 in fine. Meanwhile a certain scepticism might predominate this discussion (*chapter 5*). A renewed pluralism of methods is threatening. A more coordinated (in stead of: opportunistic) interpretation of the Convention is submitted.

Instead of focussing on the Conflict of Laws of each of the separatestates, *Part 2* of the book deals with the system of the Convention.

The mode of implementation of the treaty's provisions in nationallaws is considered in *chapter 6*. Implementations as such are admitted only when fulfilled in an appropriate form. The lack of conclusive European directives poses the question as to the decisive margin left to the authorities of those states, implementing the Convention in their own laws. A systematically as well as grammatically modified reception of the ECC, such as was pulled through in the redrafted German Civil Code (EGBGB) has been strongly criticised. The "instruction" to the judge (art. 18 ECC respectively 36 of the German preliminary rules to the Civil Code) to interpret the Convention possibly uniformely cannot take away the objections that have been mentioned. Another complication is constituted by the fact that a uniform interpretation by the European Court of Justice is notprovided for yet.

In *chapter 7* the opinion it is submitted that the question whether the contract is "international" or not (art. 1 requires for the applicability of the convention that "the rules of this convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries") shows a substantive interest: e.g. the possible obligation to consider foreign mandatory rules will be influenced by the on judge forehand, while answering this question. Determination of the required measure of internationality with the help of the objective conflicts rules themselves, if this would be possible, is in fact not recommendable. Given the lack of practical directives in both the text of the Convention and the explanatory report, the classical contact counting theory respectively the functional`economic method or even a combination of both are to be consulted. The functional-economic method seems to be adequate for especially those cases seemingly having no contacts "beyond the border", their "international" character nevertheless being indisputable on functional economic grounds. One might think e.g. of the so called "foreign, yet internal case", the international market trade transaction, as well as the "occasional" internationality. As an example of the last category may be seen the (long term) employment contract, on which the employee ordinarily working "at home" incidentically operates abroad.

The conflicts rule of art. 4, is based upon the principle of the "closest connection" (subsection 1): Except for contracts with regard

to an interest in immovable property or a right to use immovable property (subsection 3) and contracts for the carriage of goods (subsection 4) it contains the basic rule for international contracts (subsection 2). All of these refutable presumptions are subordinatedto the escape clause of a "closer connection with another country" (subsection 5). *Chapter 8* deals with the relationship between the refutable presumption of art. 4.2, being based upon the doctrine of the characteristic performance, and the alternative proper law prescriptions of art. 4.5. Of all methods the characteristic performance doctrine does not prove to be the perfect proper law determination. Neither the nature of the contract itself, nor its social-economic function point compulsory in the direction of the law designated by art. 4.2. It rather seems to reflect a somewhat metajuridical classification of mutually differing types of contracts. Moreover, it fails to provide solutions for contracts containing exclusively monetary obligations or no monetary obligations at all. Its positive feature lies in more modest values. Thus the calculation of the commercially acting contract party should be mentioned: Contracts are principally to be governed by the law of this party, being characteristic performer. The effectuation of this interest however is to be achieved by using neither the so called "factual empirical" nor the "functional" derivation of who is to be considere das the "characteristic" performer. Instead, the "normative a priori"-variant should be point of departure. This would present the following advantages: The explanatory report which hesitates between the "being" and the "social`economic functions" of the contract will thus appropriately be steered in the right direction; exchange contracts as well as exclusively monetary transactions are to be solved directly with the help of the rule laid down in subsection 5; finally, the defended solution will lead to a coherence of the total set of conflict of law provisions of art. 4, the base of this article being constituted by a previously clearly defined doctrine of the characteristic performance. Other interests as the one of calculation are by no means to be ignored but will have to be considered as soon as subsection 5 will be applicable. If the doctrine of the characteristic performance could be considered as the perfect theory in ascertaining the proper law of the contract, the query after its social functioning should be superfluous.

The signalised failures of the doctrine do not necessarily mean that it couldn't survive socially inspired critic.

The rather narrow basis of the rule of art. 4.2 will bring about a certain upward pressure of the alternative rules of art. 4.5. As the explanatory report doesn't hand over clear guidelines, only recommendations are to be made. The relationship between art. 4 subsections 2 and 5 should be dealt with by the judge ex officio. While filling in the proper law rule of subsection 5, the judge will have to leave behind the well known and in advance prescribed specific hard and fast rules that have prevailed in many systems of law uptill now. He will have to decide in each case without yet overcharging the choice of law process (chapter 5). Neither should he overlook minimum conditions according to the doctrine of "Typenbildung" respectively the characteristic performance.

The precise applicability of the escape clause of art. 4, subsection 5 will be ascertained easier in case no characteristic performance exists than in case a more close relationship with another state is submitted. In some cases, even the rule laid down in subsection 5 will fail to offer any answer. Thus the lex fori will have to decide.

The method which eventually was selected by the draftsmen of the Convention, resulting in two identically shaped conflict of law rules concerning respectively consumer contracts (art. 5) and individual employment contracts (art. 6), is discussed in *chapter 9*. The question is raised how far this similarity prescribes an equal treatment of both contract types. At all events, both rules make a less "metajuridical" impression than e.g. art. 4.2.

As to the question whether art. 7 still should retain a protective function under the definitve version of the Convention, an analogous treatment is not recommended, although the explanatory report suggest otherwise. A "convalescence" with the help of art. 7 of not fulfilled choice of law conditions yet required by both protective provisions would easily walk out on the usurpation of the criterion of "the protection in accordance with the own social sphere"; even could such proceeding bring on the favouring (instead of: protection) of the consumer. The situation is different however, in case of an employment contract. The criterion "protection in accordance with the social sphere of the consumer, respectively employee" is by no means abused in case of an employee sent to another country

temporarily, invoking security law provisions of the local law of that country.

The already cited protection criterion - "protection in accordance with the own social sphere" - also deserves attention as far as the "limited scope" of the proper law of the contract is concerned. The already noted protection criterion equally calls for different solutions. Once again a hard and fast rule equally developped for both contract types cannot be provided. Lex fori scope rules cannot be ignored by the judge. Foreign scope rules will be ignorable far easier. Besides, scope rules limiting the applicabilty of the proper law should be ignored only when they lead to any result directly harming the aim of a "protection in accordance with the own social sphere of the asserted weaker contract party."

Bearing in mind the above premisses according to the overall system of the Convention, the following conclusions with respect to the proper law rules being dominated by the protection principle are drawn.

The proper law provision that has been developped for consumer transactions will not be served by a total summing up of respectively all conceivable cases as well as an autonomous interpretation of the proper law formula given. Thus the goal aimed at - "protection in accordance with the social sphere of the protectworthy" - would be highly frustrated. An enumeration of all imaginable circumstances, as in art. 5, should therefore be omitted; the method followed by the Austrian choice of law statute is preferred. This tunes in to the more effective notion "activities by the seller in order to induce the consumer to contract". The applicability of the law of the country in which the consumer has his habitual residence results in a deficit of protection as soon as the consumer goes abroad in order to accept the performance of an obligation. Consequently, a protection in accordance with the economic market the consumer is involved with, should be preferred.

No more than for consumer contracts, an autonomous interpretation of the notions "employment contract" and "employee" should be pursued for individual employment contracts. Once again, the judge should be guided by local policies prevailing at the place of labour. The aspect of qualification - should art. 4 or art. 6 ECC apply? - hardly raises problems. In the first place, the provisions of both art. 4

and art. 6 contain the escape clause of a "closer connection" (which provision not laid down in art. 5); moreover, the alternatively in more than one country working "contractor" ("employee" in a narrow sense as well as other "workers"), will be entitled to the supplementary protection of art. 7.

The employment contract connected with more than one state will frequently urge the judge to choose the applicable law out of mutually competing systems of law: i.e. the law of the place where the emplyee habitually carries out his work - art. 6.2, sub (a) - and the law of the place of bussiness of the employer - art. 6.2 sub (b). Unlike the proper law formula of art. 4.2, a "closer connection" with another system of law (art. 6.2 in fine) will hardly be expectable. The balance between the called conflict of laws rules won't offer any guideline in advance, thus contrasting with the "mechanically" operating rule of art. 4.2. Consequently, the "closest connection" will have to be ascertained in each case. Therefore art. 6.2 reveals the outcome of the arbitrary choice of law weighing process more than that it hands over concrete guidelines to the judge.

Finally some remarks are made with respect to the special local law rule of art. 6 of the Dutch BBA. From Dutch point of view this provision is likely to be considered as a mandatory rule, to be applied on the basis of art. 7.2 ECC: It should apply irrespective of what law governs the contract. Foreign colleagues of the Dutch judge could apply the rule with the help of art. 7.1 ECC. Moreover they could use the escape device of art. 6 ECC, but only if Dutch law is the proper law of the contract.

Finally, *chapter 10* contains the conclusions of the inquiry.